Ong Siew Keet v Wan Ariff bin Wan Hamzah

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–288 OF 2000
AZMEL J
15 OCTOBER 2006

Civil Procedure — Action — Cause of action — Plaintiff claimed that there was an agreement between plaintiff and defendant for plaintiff to sell to defendant shares — Whether plaintiff had a cause of action against defendant — Whether there was nexus in documents establishing claim

Contract — Sale of shares — Oral agreement — Whether an agreement exists between plaintiff and defendant — Whether plaintiff was to sell 480,000 shares in Haven Malaysia to defendant for cash consideration of RM3,376,935.00 and 339,122 BAB shares

The plaintiff alleged that he was the owner of certain shares in Pinewell Engineering (M) Sdn Bhd ('Pinewell'). He was also an employee of the Haven Group of Companies in Malaysia which include Haven Automation Industries (M) Sdn Bhd ('Haven'). The defendant at all material times was a director of Bumi Amanda Navigation Sdn Bhd which subsequently merged with Haven for floatation on the Kuala Lumpur Stock Exchange ('KLSE') through a holding company called Bumi Amanda Bhd ('BAB'). The defendant expressed keen interest to acquire Haven on behalf of Bumi Amanda Navigation Sdn Bhd as part of its restructuring exercise prior to the listing of BAB on KLSE. In furtherance of such keen interest, it was contended that an oral agreement was concluded between Pinewell and the defendant for the purchase of the Haven shares to the defendant. The said shares sale agreement was contended to have been confirmed by a letter dated 3 October 1995 from the plaintiff addressed to the defendant ('the said letter'). The plaintiff further contended that Pinewell had novated its entire investment in Haven to the plaintiff. The plaintiff's claim against the defendant in this action were as follows: (a) an order that 339,122 shares of BAB be forthwith transferred by the defendant in favour of and/or to account of the plaintiff absolutely free from all encumbrance; (b) alternatively damages in the sum of RM8 per BAB share representing the traded price of the BAB shares as at 3 April 2000 in lieu of the transfer of 339,122 shares in BAB to the plaintiff.

Held:

(1) There was no valid ground to conclude that the plaintiff had any locus standi to sue the defendant on behalf of Pinewell. Only Pinewell could enforce such right to sue the defendant. Neither could the plaintiff sue the defendant by way derivative action because the plaintiff could not comply with stringent requirements of the law (see para 22).

(2) The only piece of document produced by the plaintiff to support his claim that such novation had taken place was a resolution dated 1 April 1996 passed by the Board of Directors of Pinewell resolving that RM90,000 worth of shares of Pinewell in Haven were to be sold by Pinewell to the plaintiff for RM90,000 ('resolution'). There was no nexus between the resolution and the said letter which the plaintiff used as the basis of his claim in this action. There was nothing whatsoever to support the plaintiff's contention that a novation had taken place from the original contract between the defendant and Pinewell to a new contract between the plaintiff and the defendant. In addition to that there was no evidence that the defendant, a party to the original contract, had agreed to any substitution of contract. The plaintiff could not have a cause of action against the defendant based on the said letter (see paras 25–27).

(3) The said letter contained several material uncertainties. Firstly, there existed two letters of the same date written by plaintiff to the defendant containing different terms and conditions. If it was true that an agreement had been reached between the plaintiff and the defendant prior to the plaintiff writing the said letter then there should only be one letter that needed to be written. Secondly, there was no evidence adduced that the defendant had agreed to the terms and condition contained in the said letter. The said letter was written by the plaintiff to the defendant. If it had been written by the defendant to the plaintiff, then the said letter would carry certain weight. Because it was written by the plaintiff to the defendant and it was the plaintiff who stated the terms and conditions then it becomes a self-serving letter which made the court cautious to accept the truth of the content of the said letter (see para 28).

(4) To consider the content of the said letter, it would be incumbent upon the plaintiff to satisfy the court first concerning the threshold issue that there was nexus between the said letter and the resolution. The plaintiff had failed to prove such nexus. There was no novation of contract between the plaintiff and the defendant substituting the original contract between Pinewell and the defendant. The said letter was written by the plaintiff on behalf of Pinewell for an action against the defendant. In the absence of a novated contract the plaintiff had no legal capacity to sue the defendant on behalf of Pinewell (see paras 29–30).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa beliau adalah pemilik sahma tertentu dalam Pinewell Engineering (M) Sdn Bhd ('Pinewell'). Beliau juga pekerja Haven Group of Companies di Malaysia yang termasuklah Haven Automation Industries (M) Sdn Bhd ('Haven'). Defendan pada setiap masa matan adalah pengarah Bumi Amanda Navigation Sdn Bhd yang kemudiannya telah bergabung dengan Haven untuk pengapungan di Bursa Saham Kuala Lumpur ('BSKL') melalui syarikat pegangan dikenali sebagai Bumi Amanda Bhd ('BAB'). Defendan telah menyatakna minat untuk memperoleh Haven bagi pihak Bumi Amanda Navigation Sdn Bhd sebagai sebahagian daripada latihan menstrukturkan semulanya sebelum penyenaraian BAB di BSKL. Minat tersebut selanjutnya, dihujahkan bahawa satu perjanjian lisan telah dimasuki antara Pinewell dan defendan untuk membeli saham-saham Haven kepada

defendan. Perjanjian jualan saham-saham tersebut dihujahkan telah disahkan melalui sepucuk surat bertarikh 3 Oktober 1995 daripada plaintif yang dialamatkan kepada defendan ('surat tersebut'). Plaintif berikutan itu menegaskan bahawa Pinewell telah menovasikan keseluruhan pelaburannya ke dalam Haven kepada plaintif. Tuntutan plaintif terhadap defendan dalam tindakan ini adalah seperti berikut: (a) suatu perintah agar 339,122 saham BAB dipindahkan oleh defendan untuk dan/atau kepada plaintif bebas daripada sebarang sekatan; (b) secara alternatif ganti rugi sejumlah RM8 untuk satu saham BAB mewakili harga dagangan saham BAB setakat 3 April 2000 sebagai ganti pindahmilik saham 339,112 dalam BAB kepada plaintif.

Diputuskan:

(1) Tiada alasan sah untuk memutuskan bahawa plaintif mempunyai locus standi untuk menyaman defendan bagi pihak Pinewell. Hanya Pinewell yang boleh menguatkuasakan hak untuk menyaman defendan. Plaintif juga tidak boleh menyaman defendan melalui tindakan terbitan kerana plaintif tidak dapat mematuhi keperluan undang-undang yang ketat (lihat perenggan 22).

(2) Satu-satunya dokumen yang dikemukakan oleh plaintif untuk menyokong tuntutannya bahawa novasi tersebut telah berlaku adalah satu resolusi bertarikh 1 April 1996 yang diluluskan oleh Lembaga Pengarah Pinewell yang memutuskan bahawa saham-saham Pinewell dalam Haven bernilai RM90,000 hendaklah dijual oleh Pinewell kepada plaintif untuk RM90,000 ('resolusi tersebut'). Tiada neksus antara resolusi tersebut dan surat tersebut yang mana plaintif telah gunakan sebagai asas tuntutannya dalam tindakan ini. Tiada apa langsung yang menyokong hujah plaintif bahawa satu novasi telah berlaku berdasarkan kontrak asal antara defendan dan Pinewell kepada kontrak baru antara plaintif dan defendan. Bahkan tiada keterangan bahawa defendan, pihak kepada kontrak asal, telah bersetuju kepada apa-apa perubahan kontrak itu. Plaintif tidak mungkin ada kausa tindakan terhadap defendan berdasarkan surat tersebut (lihat perenggan 25–27).

(3) Surat tersebut mengandungi beberapa ketidakpastian yang nyata. Pertamanya, terdapat dua surat yang mempunyai tarikh sama ditulis oleh plaintif kepada defendan yang mengandungi terma dan syarat berbeza. Jika benar suatu perjanjian telah dicapai antara plaintif dan defendan sebelum plaintif menulis surat tersebut maka sepatutnya ada satu surat sahaja yang perlu ditulis. Keduanya, tiada keterangan telah dikemukakan bahawa defendan telah bersetuju kepada terma dan syarat yang terkandung dalam surat tersebut. Surat tersebut telah ditulis oleh plaintif kepada defendan. Jika ia telah ditulis oleh defendan kepada plaintif, maka surat tersebut mempunyai kepentingan. Oleh kerana ia ditulis oleh plaintif kepada defendan dan plaintiflah yang telah menyatakan terma dan syarat tersebut maka ia menjadi surat untuk diri sendiri yang menjadikan mahkamah lebih berhati-hati untuk menerima kebenaran kandungan surat tersebut (lihat perenggan 28).

(4) Untuk mempertimbangkan kandungan surat tersebut, adalah wajib untuk plaintif meyakinkan mahkamah terlebih dahulu tentang isu yang dipersoalkan bahawa terdapat neksus antara surat tersebut dan resolusi itu. Plaintif telah gagal untuk membuktikan neksus tersebut. Tiada novasi kontrak antara

plaintif dan defendan menggantikan kontrak asal antara Pinewell dan defendan. Surat tersebut telah ditulis oleh plaintif bagi pihak Pinewell untuk satu tindakan terhadap defendan. Dalam ketiadaan satu kontrak novasi plaintif tiada kapasiti sah untuk menyaman defendan bagi pihak Pinewell (lihat perenggan 29–30).]

Notes

For cases on cause of action, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 40–54.

Cases referred to

Abdul Rahim bin Aki v Krubung Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417 (refd)

Government of Malaysia v Adnan bin Awang & Ors. [1980] 2 MLJ 291 (refd)

Prudential Assurance Co Ltd v Newman Industrial Ltd (No 2) [1980] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31 (refd)

Legislation referred to

Contracts Act 1952 s 62

Ashok Kandiah (Hema Markandan (Liza Chan & Co) for the plaintiff.
S Sitpa (Mohd Fariz Othman with her) (Ariff & Co) for the defendant.

Azmel J:

PLAINTIFF'S CLAIM

[1] The plaintiff's claim against the defendant in this action are as follows:

(i) an order that 339122 shares of Bumi Amanda Bhd be forthwith transferred by the defendant in favour of and/or to account of the plaintiff absolutely free from all encumbrance;

(ii) alternatively damages in the sum of RM8.00 per BAB share representing the traded price of the BAB shares as at 3 April 2000 in lieu of the transfer of 339122 shares in Bumi Amanda Bhd. to the plaintiff.

(iii) further and/or other reliefs.

PLAINTIFF'S CASE

[2] The plaintiff alleged that he was the owner of certain shares in Pinewell Engineering (M) Sdn Bhd ('Pinewell'). He was also an employee of the Haven Group of Companies in Malaysia which include Haven Automation Industries (M) Sdn Bhd ('Haven'). As at 31 December 1992, Haven had 140,000 ordinary shares held by three shareholders, namely:

(i) Alfa Meli Sdn Bhd — 49,000 shares;

(ii) Ahmad Fizal Othman — 49,000 shares;

(iii) Haven International — 42,000 shares. (S) Pte Ltd.

A **[3]** The plaintiff further alleged that due to his oral encouragement and express invitation the defendant was able to acquire shares in Haven through the issue of an additional 160,000 ordinary shares with these additional shares Haven had a total of 300,000 shares.

B **[4]** It was contended by the plaintiff that he had given specific assistance to enable the defendant to acquire the 160,000 Haven shares namely by conducting negotiations with both Alfa Meli and Ahmad Fizal Othman to dispose off their respective interest in Haven to the defendant. The plaintiff further contended that in consideration of the assistance by the plaintiff the defendant agreed to transfer **C** 60,000 shares in Haven together with the 42,000 shares of Haven International (S) Pte. Ltd. in Haven to Pinewell upon the conclusion of the restructuring exercise of the Haven Group of Companies in Malaysia which represents 34% of Haven's paid up capital.

D **[5]** During the period between November 1992 and August 1993 several events had taken place. During this period the defendant acquired all the shares from both Alfa Meli and Ahmad Fizal Othman in Haven. During the same period the defendant executed a trust deed declaring that he held 60,000 ordinary shares in Haven on trust for Pinewell. The plaintiff contended that it was orally agreed between the plaintiff and the defendant that the plaintiffs interest in Haven would **E** be reduced from 34% to 30% and such interest would be held through Pinewell. Thus, in addition to the 60,000 shares that were held on trust for Pinewell, the defendant held another 30,000 shares on trust for the plaintiff.

F **[6]** Another Injection exercise took place in or about 28 August 1993 where the paid up capital of Haven were increased to RM400,000. And on 21 January 1994 in another Injection exercise the paid up capital of Haven was increased to RM1,600,000.

G **[7]** Consequent to the said Injection exercises the plaintiff contended that his share in Haven had also increased. The plaintiff contended that resulting from those Injection exercises the defendant now held 480,000 ordinary shares of Haven on trust for the plaintiff.

H **[8]** The defendant at all material times was a director of Bumi Amanda Navigation Sdn. Bhd. which subsequently merged with Haven for floatation on the Kuala Lumpur Stock Exchange ('KLSE') through a holding company called Bumi Amanda Bhd ('BAB'). The defendant expressed keen interest to acquire Haven on behalf of Bumi Amanda Navigation Sdn. Bhd. as part of its restructuring exercise prior to the listing of BAB on KLSE.

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[9] In furtherance of such keen interest an oral agreement was concluded between Pinewell and the defendant for the purchase of the Haven shares to the defendant. The said shares sale agreement was confirmed by a letter dated 3 October 1995 from the plaintiff addressed to the defendant.

[10] The plaintiff contended that based on the letter it was agreed that the purchase consideration of the sale of the Haven Shares, would be satisfied on the following terms and conditions:

(a) 25% of the Haven Sale Shares to be paid in cash by the defendant on the following terms and conditions:

(i) RM500,000 on or before 1 November 1995;

(ii) RM750,000 on or before 31 December 1995;

(iii) RM250,000 on or before 31 January 1996;

(iv) RM1,500,000 to be paid on or before an initial offer of the said BAB shares is made to the public;

(v) any monitory benefits including premium bonus and rights issue obtained as a result of the aforesaid shares being floated in the Kuala Lumpur Stock Exchange is to be shared between Pinewell and the defendant respectively in the share ratio of 30%:70%.

(b) the remaining 5% of the Haven Sale Shares are to be converted to an equal percentage of shares in BAB amounting to 339122 shares ('the BAB shares'). The BAB shares are to be held on trust by the defendant for an on behalf of Pinewell and shall be transferable in favour of Pinewell absolutely within twelve (12) months of an initial public offer subject to any moratorium imposed by the Securities Commission.

[11] The plaintiff further contended that on or about 1 April 1996, Pinewell had novated its entire investment in Haven to the plaintiff. The plaintiff also contended that the defendant was aware of the said Novation. The plaintiff based such claims on the following reasons:

(a) the said Novation was verbally intimated by the plaintiff to the defendant on numerous occasions;

(b) the defendant in acting upon the said Novation remitted payments for and in respect of the purchase of the Haven Sale Shares directly to the plaintiff in the sum of RM3,376,935 in accordance with the terms and conditions as mentioned above.

[12] Because the defendant had committed a breach of the terms of the Haven Shares Sale Agreement in that the defendant had refused to transfer the BAB shares to the plaintiff the plaintiff commenced this action against the defendant.

THE DEFENDANT'S CASE

[13] The defendant contended that Pinewell had never paid for any shares of Haven or shares of its subsidiary companies. Defendant only purchased shares from Haven in November 1992 and during that time the plaintiff was employed in Haven as a manager.

[14] In his defence, the defendant said that the plaintiff had made a suggestion that in order to maximise the profitability of Haven Group, the senior officers of Haven Group should be given incentives. The plaintiff suggested that 30% of the Haven

shares be set aside with a view to be given to Pinewell free of charge. The plaintiff made a representation that the officers who were given incentives would be the trustees on Pinewell shares.

[15] In 1995, the defendant had agreed that Pinewell would be paid in cash a sum equivalent to 30% of twice the amount of net tangible asset (NTA) of Haven. The target of Haven's NTA to be achieved was RM6m or more. At the end of the year 1995, the plaintiff made a representation to the defendant that Haven had achieved the required target and based on the plaintiff's representation the defendant had made payment of RM3.6m to Pinewell. A sum of RM3,427,135 was paid to the plaintiff on behalf of Pinewell on the basis of the plaintiff's representation.

[16] Subsequently, the defendant discovered the NTA of Haven did not actually achieve RM6m and because of the discovery the defendant decided to refuse to pay the outstanding amount due. The investigation carried out by the defendant revealed that the plaintiff had caused falsification of the account of Haven in order to justify the NTA to reach RM6m. On the basis of the inflated NTA of Haven due to the falsification of the account, the defendant had paid in excess of RM262,768.14 to the plaintiff.

[17] The defendant further alleged that in August 1998, the plaintiff gave an undertaking to the defendant that he would agree to purchase 12,000 shares of BAB for the benefit of the defendant's secretary. A sum of RM23,012.58 was given by the defendant to the plaintiff with a view to carry out such purpose. The defendant also gave direction to the plaintiff to transfer the shares to the defendant's secretary py the name of Puan Yee Chiong Foon. But the plaintiff had failed to comply with his undertaking.

DEFENDANT'S COUNTERCLAIM

[18] In his counterclaim, the defendant applied that the plaintiff return the excess payment of RM262,768.14 and the transfer of the 12,000 BAB shares to the account of Puan Yee Chiong Foon plus costs.

MAIN ISSUE

[19] The main issue that had to be determined in this case is whether there was in fact an agreement between the plaintiff and the defendant for the plaintiff to sell to the defendant 480,000 shares in Haven Malaysia to the defendant for cash consideration of RM3,376,935 and 339,122 BAB shares.

[20] It is common ground that the plaintiffs claim was based on oral agreement. The strongest documentary evidence relied by the plaintiff that the oral agreement was true were two letters produced by the plaintiff to the defendant both dated 3 October 1995 (pp 1–4 of Bundle C). But the letters were written by Pinewell to the defendant though signed by the plaintiff. In other words there were no evidence shown in Court that the plaintiff in his personal capacity had written any letters to

the defendant. It is therefore very doubtful to conclude that based on the two letters there was conclusive evidence of contract entered between the plaintiff and the defendant. The essential element of locus is missing. It is in evidence that at the date when the two letters were written the plaintiff was no longer a director or shareholder of Pinewell. Therefore in what lawful capacity could the plaintiff write the letters on behalf of Pinewell? In the case of *Abdul Rahim bin Aki v Krubung Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, the Court of Appeal in dealing with the issue of locus of a company to sue, said as follows (at p 426):

> ... It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus stand! to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co Ltd v Newman Industrial Ltd (No 2)* [1980] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31.

[21] However, it is of relevance to note that the law recognises an exception to the principle that is stated above. But the party seeking such exception has to satisfy certain requirements. That exception is also discussed in the same *Prudential Insurance* case:

> We now turn to consider the one exception with which this case is concerned. It is the derivation action; an ingenious procedural device created by the court of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not for that reason permit an action to be brought in its name. In these circumstances a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrong-doers must be cited as defendants. So too must the company. The title to this action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the original process must disclose that it is derivation action and recite the facts that make it so. Further there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

[22] Applying the above principle to the facts of this case, I was unable to see any valid ground to conclude that the plaintiff had any locus stand! to sue the defendant on behalf of Pinewell. Only Pinewell could enforce such right to sue the defendant. Neither could the plaintiff sue the defendant by way derivative action because the plaintiff could not comply with stringent requirements of the law.

[23] I shall now consider the plaintiff's contention that the contract for sale of the 480,000 shares was novated to the plaintiff. As such, the plaintiff argued that he had the right to enforce the letter dated 3 October 1995 against the defendant. In order to succeed in his argument, it is incumbent upon the plaintiff to show sufficient evidence of such novation having taken place.

[24] One essential requirement of a novation is the existence of the original contract and a new contract that had been novated. It also requires the parties to the original contract to consent to the novation. Novation or substitution of contract is clearly stated under s 62 of the Contracts Act 1952. In *Government of Malaysia v Adnan bin Awang & Ors.* [1980] 2 MLJ 291, Wan Yahya J (as he then was) dealt with the issue of novation and the application of s 62. He held:

> Section 62 of the Contracts Act reads:
>
> > If the parties to a contract agree to substitute a new contract for it, or to rescind or after it, the original need not be performed.
>
> For the operation of this section, as I understand it, the party claiming such a relief must not only show the intention to novate or that the terms of the subsequent contract are so inconsistent with the former one as to imply that intention but he must also prove that all the parties to the former contract have consented to the terms of the subsequent one. In *TM & Co v HI Trust*, it is stated:
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> > Mr Mukherjee in support of this point relied on the statement of law in 8 *Halsbury* (3rd Ed), p 258, art 451 that a party to a contract cannot transfer his liability there under without the consent of the party and such liability can only be transferred to a tripartite agreement which in cases will amount to a novation. That principle is well settled by numerous decisions such as *Khardah Co Ltd v Raymon & Co (India) Private Ltd* AIR 1962 SC 1810 at p 1817.

[25] Before me, the only piece of document produced by the plaintiff to support his claim that such novation had taken place was a resolution dated 1 April 1996 passed by the Board of Directors of Pinewell resolving that RM90,000 worth of shares of Pinewell in Haven Malaysia were to be sold by Pinewell to the plaintiff for RM90,000. This was stated by the plaintiff in his written witness statement (see para 18 exh P1A). The plaintiff also stated the similar fact in his oral testimony (see pp 33–34 of the notes of proceedings).

[26] On examining the content of the Pinewell Resolution, I was unable to conclude that there existed a nexus between the resolution and the letter of 3 October 1995 which the plaintiff used as the basis of his claim in this action. In fact the Pinewell Resolution only mentioned of a sale of 90,000 shares of Pinewell in Haven Malaysia at RM1 per share to the plaintiff. There was no mention whatsoever regarding the 480,000 shares that was stated in the letter of 3 October 1995. But what was equally important if not the most important fact is the omission of there having a novation or substitution in the said resolution. In the absence of any mention of novation, there was nothing whatsoever to support the plaintiff's contention that a novation had taken place from the original contract between the defendant and Pinewell to a new contract between the plaintiff and the defendant. In addition to that, there was no evidence that the defendant, a party to the original contract, had agreed to any substitution of contract.

[27] In the light of the facts and circumstances as mentioned above, I was unable to see how the plaintiff could have a cause of action against the defendant based on the letter dated 3 October 1995.

[28] Even the letter of 3 October 1995 that was heavily relied upon by the plaintiff, contained several material uncertainties, Firstly, there existed two letters of the same date written by plaintiff to the defendant containing different terms and conditions. Which letter should be applicable? If it was true that an agreement had been reached between the plaintiff and the defendant prior to the plaintiff writing the letter then there should only be one letter that needed to be written. Secondly, there was no evidence adduced in court that the defendant had agreed to the terms and condition contained in the letter. But what is quite striking to me regarding this letter is that it was written by the plaintiff to the defendant. If it had been written by the defendant to the plaintiff, then I could conclude that the letter would carry certain weight. Because it was written by the plaintiff to the defendant and it was the plaintiff who stated the terms and conditions then it become a self-serving letter which made the court to be cautious to accept the truth of the content of the letter.

[29] In any case, it is my considered view that these would not serve much purpose for me to further examine the content of the said letters and to decide which of the two letters should be used for this action. I feel that before proceeding to consider the content of the said letters it would be incumbent upon the plaintiff to satisfy me first concerning the threshold issue that there was nexus between the letter of 3 October 1995 and the Pinewell Resolution of 1 April 1996. On the evidence adduced before me, the plaintiff had completely failed to prove such nexus.

[30] In the light of the facts and circumstances as mentioned above, it was my finding that there was no novation of contract between the plaintiff and the defendant substituting the original contract between Pinewell and the defendant. The letter of 3 October1995 was written by the plaintiff on behalf of Pinewell for an action against the defendant. In the absence of a novated contract, I ruled that the plaintiff had no legal capacity to sue the defendant on behalf of Pinewell. I therefore dismissed the plaintiff's claim.

[31] As to the defendant's two counterclaims I also dismissed them. In the light of the fact that the defendant had not filed any appeal against my decision it would therefore be unnecessary for me to give my grounds of decision in respect of the defendant's counterclaims. Suffice it for me to echo the words of the defendant that he did not wish to claim for the return of the RM2.427,135 paid to the plaintiff which amount the defendant alleged was wrongfully given because the target of getting NTA RM6m of the Haven Group for the year ending 1995 was not reached as the defendant felt the plaintiff would not have the capacity to pay back the amount. In the light of such magnanimity on the part of the defendant, I therefore decided, together with some other grounds, to dismiss the defendant's counterclaims.

[32] I also ordered that each party to bear his own costs.

Order accordingly.

Reported by Peter Ling